IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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SUPREME COURT, U.S.

NO. 79-6341

DAVID D. MARTIN, Petitioner,

V.

STATE OF LOUISIANA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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March 28, 1980

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The petitioner, DAVID D. MARTIN, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana affirming his conviction and sentence of death. The judgment of the Supreme Court of Louisiana was entered on October 8, 1979, in State of Louisiana v. Martin, No. 62,687, and rehearing was denied on November 1, 1979.

OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported at 376 So.2d 300 (La.1979) and is attached hereto as Appendix A.

JURISDICTION

The judgment and opinion of the Supreme Court of Louisiana were filed on October 6, 1979. On November 1, 1979, the petition for rehearing was denied by the Supreme Court of Louisiana. On November 9, 1979, the District Court For The Seventeenth Judicial District (Parish of LaFourche) signed a death warrant which set

the petitioner's execution date for February 8, 1980. On January 8, 1980, this Court, per Mr. Justice Powell, granted petitioner's application for an extension of time to March 30, 1980, within which to file the petition for writ of certiorari. (Appendix B.) On January 28, 1980, the petitioner's execution was stayed by the Supreme Court of Louisiana "until such time as the United States Supreme Court takes final action on his writ of certiorari or until such other time, in advance of that date, as this Court deems proper." (Appendix C.) This Court's jurisdiction to review by writ of certiorari is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. WHETHER THE AFFIRMANCE OF THE PETITIONER'S DEATH SENTENCE BY THE LOUISIANA SUPREME COURT WITHOUT ANY CONSIDERATION OF ONE OF THE FACTORS UPON WHICH THE JURY BASED ITS SENTENCE RECOMMENDATION CONTRAVENES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE SUCH LIMITED APPELLATE REVIEW FAILS TO MINIMIZE THE RISK OF ARBITRARY AND CAPRICIOUS ACTION BY THE SENTENCING JURY.

The jury at petitioner's trial found two statutory aggravating circumstances to have existed: (1) the offender knowingly created a risk of death or great bodily harm to more than one person; and (2) the offense was committed in an especially heinous, atrocious or cruel manner. After reviewing the propriety of the first aggravating circumstance, the Supreme Court of Louisiana concluded that further appellate review was unnecessary, since the jury had the authority under Article 905.3 of the Louisiana Code of Criminal Procedure to impose a death sentence after it found "at least one statutory aggravating circumstance." (Appendix A at page 23; Appendix D at page 1.) Therefore, the state supreme court deemed "it unnecessary to inquire whether the jury could have correctly found that the offense was committed in an especially heinous, atrocious or cruel manner." (Appendix A at page 23.)

The reasoning of the Supreme Court of Louisiana raises a perplexing question as to the proper scope of appellate review in a capital case. While that court was correct in asserting that the jury had the authority to impose a death sentence after finding the existence of one statutory aggravating circumstance, there is nothing in the capital sentencing law of Louisiana that requires it to recommend a death verdict under such circumstances. Instead, the jury was expressly instructed that "[e]ven if you should find beyond a reasonable doubt that one or more aggravating circumstance (sic) exists and even if you should determine that no mitigating circumstances exist, although under the law you would be authorized to impose a sentence of death you are not required to do so". (Appendix F, TR. 1619, L. 30 - 1620, L. 4.) (emphasis supplied.)

Furthermore, there is no statutory requirement, nor was the jury instructed, that all of the jurors must agree on the same aggravating circumstance as the basis for a death sentence. Therefore, some of the jurors might have recommended death solely because of the presence of the aggravating circumstance that was reviewed by the Supreme Court of Louisiana. Other jurors might have returned their recommendation because of the presence of the second, unreviewed aggravating circumstance or because of a combination of the two factors.

Yet, the second aggravating circumstance might have been based on insufficient evidence (Jackson v. Virginia, ___ U.S. ____, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)), or the jury might have adopted an impermissibly broad construction of the "especially heinous, atrocious or cruel" aggravating circumstance in the circumstances of the present case, Godfrey v. Georgia, No. 78-6899, cert. grtd., ___ U.S. ____, 100 S.Ct. 204, 62 L.Ed.2d 133 (October 9, 1979) or some other substantial defect might have tainted this finding. The limited scope of review adopted by the Supreme Court of Louisiana does not provide any reliable method of determining from the general verdict of the jury whe-

ther such a defect may have been present or whether the jury might have relied on an impermissible aggravating circumstance in sentencing a particular person to death. Cf. Stromberg v. California, 283 U.S. 360, 367-368 (1931). See also, Williams v. North Carolina, 317 U.S. 287, 291-292 (1942).

2. WHETHER THE AFFIRMANCE OF THE PETITIONER'S DEATH SENTENCE BY THE LOUISIANA SUPREME COURT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN THAT DECISION WAS BASED IN PART ON A FACTOR THAT WAS NEITHER FOUND BY THE JURY AT PETITIONER'S TRIAL NOR LISTED AS AN AGGRAVATING CIRCUMSTANCE IN THE CAPITAL SENTENCING LAW IN EFFECT AT THE TIME OF THE TRIAL.

As mentioned above, the jury at petitioner's trial was instructed on and found two aggravating circumstances. However, on automatic appeal to the Supreme Court of Louisiana, that Court in part based its affirmance of the death sentence on an entirely separate consideration. Thus the state supreme court stated that "[i]t is clear from a reading of our Capital Sentencing Law that killing a victim in order to prevent that person from being able to report a separate crime (a kidnapping, an armed robbery, a separate murder, et cetera) is strictly condemned" (Appendix A at page 26). However, the jury was not instructed on this factor, and it did not find such an aggravating circumstance in its verdict. Indeed, the factor cited by the state supreme court was not even listed as one of the aggravating circumstances in the capital sentencing law in effect at the time of petitioner's trial.

This Court has recognized that appellate review of the death sentence is an essential "check against the random or arbitrary imposition of the death penalty." Gregg v. Georgia, 428 U.S. 153, 206 (1976). To conform to due process, this review process should ensure that a person sentenced to death has "the validity of (his sentence) appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948).

(brackets supplied); Presnell v. Georgia, 439 U.S. 14, 16 (1978). When the Supreme Court of Louisiana deviated from this well-charted course, by pointing to a nonstatutory aggravating factor and one not found by the jury as a basis for affirming the death sentence, the fundamental safeguards of procedural fairness in the capital sentencing law in Louisiana were rendered a nullity.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States of America.

2. This case involves the following provisions of the Louisiana Code of Criminal Procedure and of the Louisiana Supreme Court Rules: Article 905.3; Article 905.4 (as enacted in 1976); Article 905.4 (as enacted in 1979); Article 905.5; Article 905.6; Article 905.7; Article 905.8; Article 905.9; and Louisiana Supreme Court Rule 28. These articles and the Supreme Court Rule are set forth in Appendices D and E to this petition.

STATEMENT OF THE CASE

On August 24, 1977, the LaFourche Parish grand jury filed indictments[1] charging the petitioner, David D. Martin, with four separate counts of first-degree murder in violation of Louisiana Revised Statute 14:30.[2]

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1 These indictments are fully set forth in the transcript of the proceedings in the Seventeenth Judicial District, Parish of LaFourche at pp. 677-680. This transcript is on file in the Supreme Court of Louisiana and is hereinafter referred to as "Tr".

2 At the time of this offense, Louisiana Revised Statute 14:30 specified:

> "First degree murder is the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm. Whoever commits the crime of first degree murder shall be punished by death or life

Footnote continued

Petitioner's trial commenced on April 3, 1978 (Tr.3). Since there were no eyewitnesses to the alleged crimes, the prosecution relied chiefly upon the testimony of witnesses who had been advised by the petitioner of the circumstances of the offenses.

According to this testimony, petitioner had become extremely upset around August 12, 1977, because his wife was having an affair with Bobby Todd, her employer and the owner of the Black Gold Restaurant and Lounge in Houma, Louisiana (Tr.910-911; Tr. 1109). When petitioner requested her to terminate the affair, she refused his entreaties (Tr.910-912). On the evening of August 14, 1977, the petitioner went to Bobby Todd's trailer, which was located near the restaurant, and shot and killed him (Tr.916-917).[3] Immediately thereafter, the petitioner shot and killed three friends of Todd, a man and two women, who were in the trailer at the time. (Tr.916-917).[4]

Dr. Everest Trahan, a forensic pathologist who performed autopsies on the four victims, testified that they all had died from multiple gunshot wounds (Tr.813-823). On April 10, 1979, the jury returned a verdict finding the petitioner guilty of all four counts of first degree murder (Tr.1574).

At the sentencing hearing, the petitioner introduced testimony that he had come to Houma in 1974 to work in a drug rehabilitation clinic (Tr.1598-1599) and had become an active member of

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2 Footnote continued

> imprisonment at hard labor without benefit of parole, probation or suspension of sentence in accordance with the recommendations of the jury".

3 The prosecution also presented evidence that the murder weapon had been stolen a few days before from a person who had recently shown the gun to the petitioner (Tr.687-689, 689-692).

4 Petitioner told a prosecution witness that one of the women in the trailer had been shot in the stomach, but then begged him to kill her. He then shot her in the head (Tr.916).

the Seventh Day Adventist Church (Tr.1600-1601). He met his wife at this time and in December, 1976 they had a baby girl. (Tr. 1603.) Since that time the petitioner had been distraught, because his daughter had suffered brain damage during childbirth, and he somehow blamed himself for this tragedy (Tr.1604-1608). The petitioner then left his church, where he had been an active member, and quit his job at the drug rehabilitation clinic (Tr. 1604). He began taking drugs and his financial condition became considerably worse.[5] It was at this point in time that he learned of his wife's affair with Boddy Todd and committed the four murders.

At the conclusion of the sentencing hearing, the trial judge instructed the jury on all the statutory aggravating circumstances (Appendix F, Tr.1618). The jury was further instructed as follows:

> Even if you should find beyond a reasonable doubt that one or more aggravating circumstance (sic) exists and even if you should determine that no mitigating circumstances exist, although under the law you would be authorized to impose a sentence of death, you are not required to do so. [Appendix F at Tr.1619, L.30- 76-206.4.]

On April 11, 1978, the jury recommended a sentence of death under Articles 905.6 and 905.7 of the Louisiana Code of Criminal Procedure (Appendix D) and found two statutory aggravating circumstances: (1) the offender knowingly created a risk of death or great bodily harm to more than one person; and (2) the offense was committed in an especially heinous, atrocious or cruel manner (Tr.1622-1623). Pursuant to Article 905.8 of the Louisiana Code of Criminal Procedure, which requires the judge to sentence "the defendant in accordance with the recommendation of the jury" (Appendix D,3), the petitioner was sentenced to death on April 25, 1979, on each count of first degree murder.

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5 See Appendix A, dissenting opinion of Dennis, J., at 3.

On October 8, 1979, the Supreme Court of Louisiana affirmed petitioner's conviction and death sentence. The court reviewed the evidence in support of the first aggravating circumstance found by the jury and "[h]aving concluded that the jury correctly found one aggravating circumstance to exist," the court deemed "it unnecessary to inquire whether the jury could have correctly found that the offense was committed in an especially heinous, atrocious or cruel manner" (Appendix A at 23).

The petitioner then filed an application for rehearing in which he contended, inter alia, that the Supreme Court of Louisiana had erred in failing to review both aggravating circumstances and in basing its decision in part on an aggravating circumstance that was not listed in the Louisiana Code of Criminal Procedure. On November 1, 1979, this application was denied.

* * * *

REASONS FOR GRANTING THE WRIT

I

PETITIONER'S DEATH SENTENCE WAS AFFIRMED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, SINCE THE SUPREME COURT OF LOUISIANA REVIEWED ONLY ONE OF THE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY TO SUPPORT ITS DEATH VERDICT.

In returning a recommendation that the death sentence be imposed, the jury found two statutory aggravating circumstances (supra, at page 7). The Supreme Court of Louisiana reviewed one of these aggravating circumstances (the offender knowingly created a risk of death or great bodily harm to more than one person); however after having concluded that the jury properly found this factor, the state supreme court did not consider it necessary "to inquire whether the jury could have correctly found that the offense was committed in an especially heinous, atrocious or cruel manner" (Appendix A at page 23). The court

subsequently denied petitioner's application for a rehearing in which he contended that both aggravating circumstances must be reviewed to ensure a valid death verdict.

Furman v. Georgia, 408 U.S. 238 (1972) "mandates that where discretion is afforded a sentencing body in a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" Gregg v. Georgia, 428 U.S. 153, 189 (1976). In Gregg v. Georgia, supra, this Court commented on the important role of appellate review in fulfulling the mandate of Furman:

> "The provision for appellate review in the Georgia capital sentencing system serves as a check against the random or arbitrary imposition of the death penalty...In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in Furman are not present to any significant degree in the Georgia procedure applied here" Gregg v. Georgia, supra, 428 U.S. at 206-207.

The Supreme Court of Louisiana has interpreted these pronouncements to mean that the salutary goals of review can be served by appellate consideration of only one of the aggravating circumstances found by a jury. To fully understand the defects in this analytical approach, several features of the Louisiana capital sentencing procedure must be emphasized. First, neither the trial court's instructions (Appendix F)[6] nor any provisions of the Louisiana statute (Appendix D) require the jury's sentence of death to be unanimously based on any single aggravating factor found by the jurors. Second, pursuant to Article 905.7 of the

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6 The jury was merely instructed that it was authorized to return a death recommendation if it "unanimously found beyond a reasonable doubt that any of the statutory aggravating circumstances existed" (Appendix F, Tr.1619, L.2-3). The jury was also instructed to "consider any mitigating circumstances" before deciding that a sentence of death should be imposed. (Appendix F, Tr.1619, L.10-12.)

Louisiana Code of Criminal Procedure, the jury is only required to return a general verdict recommending "that the defendant be sentenced to death", listing the statutory aggravating circumstances found to exist and stating that the mitigating circumstances have been considered (Appendix D, 2-3). Third, the instructions to the jury advised the jurors that they were merely authorized, but not required, to return a death sentence even if they found one or more aggravating circumstances beyond a reasonable doubt (Appendix F, Tr.1619, L.30-1620, L.4).[7]

Given this statutory scheme, several observations are in order. It is clear at the outset that there is no reliable way to determine from the jury's general verdict which aggravating circumstances might have tipped the scales towards a death verdict. Since the jury instructions did not expressly call for jury unanimity on the circumstance(s) which would warrant a sentence of death, it is possible that four members of the jury might well have voted for a death sentence solely on the basis of the first aggravating circumstance, which was reviewed by the Supreme Court of Louisiana. However, four others might have been swayed towards a death recommendation by the presence of the second unreviewed aggravating circumstance, while the remaining four might have considered the presence of both aggravating factors to have been determinative. Moreover, a Louisiana capital sentencing jury retains the authority to recommend life imprison-

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7 The judge instructed the jury on this point as follows:

> "Even if you should find beyond a reasonable doubt that one or more of the aggravating circumstances exist and even if you should determine that no mitigating circumstances exist, although under the law you would be authorized to impose a sentence of death, you are not required to do so."

ment even though it finds one or more aggravating circumstances; therefore, the second aggravating circumstance (the offense was committed in an especially heinous, atrocious or cruel manner) might have led the jury to impose a death sentence, which in the absence of this factor, it would not have considered appropriate. Consequently, while there is a likelihood that the second aggravating circumstance played some role in the jury's ultimate decision to impose the death penalty, that finding will remain wholly insulated from any appellate review under the theory advanced by the Supreme Court of Louisiana. Absent such review, there is no assurance that the jury's discretion has been "suitably directed and limited" Gregg v. Georgia, supra, 428 U.S. at 189. As a result, there is no appellate "check against the random or arbitrary imposition of the death penalty" by a sentencing jury and "the concerns that prompted [this Court's] decision in Furman" have not been properly met. Id. at 206-207. (brackets supplied.)

There are several other fatal flaws in the approach to appellate review adopted by the Supreme Court of Louisiana. First, this principle of appellate review fails to heed the call "for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978). Instead, an articulated aspect in the jury's verdict to recommend a death sentence is not even cursorily reviewed by the appellate court. This is hardly consistent with this Court's view that "[w]hen a defendant's life is at stake, the Court has been particularly sensitive to ensure that every safeguard is observed." Gregg v. Georgia, supra, 428 U.S. at 187. See also, Gardner v. Florida, 430 U.S. 349, 357 (1977).

Second, the standard adopted by the Supreme Court of Louisiana effectively establishes a conclusive presumption that if a jury has found one valid aggravating circumstance, death must be imposed, despite the fact that the jury, had it not

consideredthe second, unreviewed circumstance might itself have chosen not to impose a death sentence. As Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976) establish, a mandatory death sentence which "fail[s] to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death," Woodson v. North Carolina, supra, 428 U.S. at 303, (emphasis added) is unconstitutional. The Supreme Court of Louisiana's automatic affirmance of petitioner's sentence becuase of the presence of one valid aggravating circumstance deprived the petitioner of appellate consideration of all those aggravating and mitigating factors which were before the jury, replacing its delicate balancing of factors with an inflexible per se rule.

Third, the state supreme court's review process does not provide sufficient protection from a death verdict based on an unconstitutional aggravating circumstance. For example, a finding by the jury that the crime was "committed in an especially heinous, atrocious or cruel manner" would fail to pass constitutional muster if "upon the record evidence adduced at the trial no rational trier of fact could have found proof beyond a reasonable doubt." Jackson v. Virginia, ____U.S. ____, 99 S.Ct. 2781, 2792, 61 L. Ed. 2d 560 (1979). See also, In re Winship, 397 U.S. 358 (1970). Indeed, this was precisely the conclusion of the dissent in the case at bar, for it perceived"no rational basis for a finding of proof beyond a reasonable doubt that[the petitioner] intended to commit a conscienceless or pitiless crime which was unnecessarily tortuous to the victims." (Appendix A, dissenting opinion of Dennis, J., at 6-7.)

Moreover, assuming that the second aggravating circumstance is constitutionally invalid, the reviewing court would have to set aside the general death verdict, since there would be no

way of determining whether the jury relied upon this unconstitutional ground in reaching its decision. Stromberg v. Californi- 283 U.S. 359, 367-368 (1931); Williams v. North Carolina, 317 317 U.S. 287, 291-292 (1941); Thomas v. Collins, 323 U.S. 516, 528-529 (1945).

As this Court explained in Street v New York, 394 U.S. 576, 587-588 (1969):

> "[E]ven assuming that the record precludes the inference that appellant's conviction might have been based solely on [the unconstitutional ground], we are still bound to reverse if the conviction could have been based upon both [the unconstitutional] and [the constitutional ground].
>
> [U]nless the record negates the possibility that the conviction was based on both ...Thomas [v. Collins, supra] dictates that '[t]he judgment . . must be affirmed as to both or as to neither,' [for otherwise]... there is an unacceptable danger that the trier of fact will have regarded the two... as 'intertwined' and have rested the conviction on both together."

Yet, the Supreme Court of Louisiana concluded that the entire death verdict was valid merely because one aggravating circumstance was appropriate. This is a shortcut to certainty when "[i]n death cases all doubts should be resolved in favor of the accused." Anders v. United States, 333 U.S. 740, 752 (1978).

In sum, under the test adopted by the Supreme Court of Louisiana, this settled principle of law would afford no relief to the petitioner, since that court considers its review process at an end when a single aggravating circumstance is found to be valid. It is shocking to consider that a potential constitutional flaw in a jury's death verdict can and will be wholly neglected during the appellate review process of the Supreme Court of Louisiana so long as one valid aggravating circumstance exists. This limited scope of review "is unacceptable and incompatible with the commands in the Eighth and Fourteenth Amendments." Lockett v. Ohio, supra, 438 U.S. at 605.

II

THE PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW WHEN HIS DEATH SENTENCE WAS AFFIRMED, IN PART, ON THE BASIS OF AN AGGRAVATING CIRCUMSTANCE THAT WAS NOT CONSIDERED OR FOUND BY THE JURY AT PETITIONER'S TRIAL.

The jury at petitioner's trial was instructed on all of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure (Appendix D at pages 1-2; Appendix F at Tr.1618). Subsequently, the jury found two of these factors to have existed at the time of the crimes: (1) the offender knowingly created a risk of death or great bodily harm to more than one person; and (2) the offense was committed in an especially heinous, atrocious or cruel manner (Tr.1622-1623). On automatic appeal to the Supreme Court of Louisiana, that court based its affirmance of the death sentence in part on the following reasons:

> Martin killed three people to prevent them from being able to disclose that he was Todd's killer. It is clear from a reading of our capital sentencing law that killing a victim in order to prevent that person from being able to report a separate crime (a kidnapping, an armed robbery, a separate murder, et cetera) is strictly condemned. (Appendix A at 26.)

However, there were no aggravating circumstances in the provisions of Article 905.4 in effect at the time of petitioner's trial that related to the killing of a witness to a crime.[8] Furthermore, the jury had not been instructed on such an aggravating circumstance nor had it predicated its recommendation of a death sentence on the basis of this factor.

8

Subsequent to the petitioner's trial, but prior to the date of decision by the Louisiana Supreme Court, Article 905.4 was amended to include the following aggravating circumstance.

> (h) The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation of prosecution of the defendant, or was an

Footnote continued

In Cole v. Arkansas, 333 U.S. 196 (1948), the petitioners were tried for one offense but their convictions were affirmed by the Supreme Court of Arkansas on the basis of evidence in the record that suggested they had committed another offense on which the jury had not been instructed. This Court unanimously reversed the convictions, stating:

> It is as much a violation of due process to send an accused to prison following conviction of a charge upon which he was never tried as it would be to convict him upon a charge that was never made... To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court. Id at 201-202.

See also, Eaton v. City of Tulsa, 415 U.S. 697, 699 (1974); Rabe v. Washington, 405 U.S. 313, 315 (1972).

"These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial". Presnell v. Georgia, 439 U.S. 14, 16 (1978). Therefore, in Presnell this Court invalidated a death sentence based on a charge of which the petitioner was neither tried nor convicted.

While the instant case arises in a slightly different factual context, similar considerations should govern an analysis of the decision of the Supreme Court of Louisiana.In a capital-sentencing system, "appellate review...serves as a check against the random or arbitrary imposition of the death penalty" Gregg v. Georgia, 428 U.S. 153, 206 (1976). See also Proffitt v. Florida,

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1 Footnote continued

> eyewitness to the crime alleged to have been committed by the defendant, or possessed other material evidence against the defendant (emphasis supplied). (Appendix E.)

428 U.S. 242, 253 (1976). Yet, this check is rendered virtually meaningless if the appellate court, rather than restricting itself to a review of the jury's findings, ranges over the evidence and testimony at trial in an effort to support the death verdict on the basis of aggravating circumstances that were not found or even considered by the jury. In effect, such an appellate process does not even function as a check on jury discretion, for the supreme court is actually making independent "findings" of its own and is not reviewing the determinations of the jury.

The deviation from traditional norms of appellate review is even more troublesome when, as in the present case, the aggravating circumstance "found" by the appellate court was not a part of the capital sentencing law in effect at the time of petitioner's trial. Indeed, the Supreme Court of Louisiana appears to have considered a statutory aggravating factor that was enacted subsequent to petitioner's trial, but prior to the decision of the state supreme court (see note 8, supra).

Finally it makes little difference that the Supreme Court of Louisiana also affirmed the death verdict on the basis of a valid aggravating circumstance found by the jury. If the supreme court had confined its review solely to the aggravating circumstances found and considered by the jury, it might very well have considered on appeal that the "sentence [was] disproportionate to the penalty imposed in similar cases "[(Rules of the Supreme Court of Louisiana 28 (Appendix D, 4)]. However, it went beyond its review role and found another nonstatutory factor to support its conclusion that the death sentence was appropriate. An appellate court no less than a sentencing jury must exercise controlled discretion in capital cases. The process of review engaged in by the Supreme Court of Louisiana ignores this principle and instead creates a substantial risk that the court was unconstrained by any statutory factors on appeal. "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments". Lockett v. Ohio, 438 U.S. 586, 605 (1978).

In sum, this case brings to mind a fundamental tenet often noted by this Court:

> [I]t is not enough that a just result may have been reached. To perform its high function in the best way justice must satisfy the appearance of justice: (citations omitted.) Proctor v. Warden, 435 U.S. 559, 560 (1978).

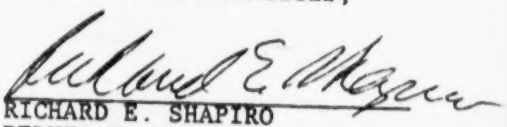
See also Gardner v. Florida, 430 U.S. 349, 358 (1977). Certainly a decision predicated in part on an aggravating circumstance not found by the jury does little to "satisfy the appearance of justice" or to guarantee that the "fundamental principles of procedural fairness" articulated in Cole v. Arkansas, supra, and Presnell v. Georgia, supra, will be properly preserved in the review of capital sentences in Louisiana.

CONCLUSION

For the reasons set forth above, petitioner David D. Martin respectfully urges this Court to grant his petition for a writ of certiorari to the Supreme Court of Louisiana.

DATED: March 28, 1980

RESPECTFULLY SUBMITTED,



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APPENDIX A

OCT 8 1979

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS

DAVID D. MARTIN

NO. 62,687

On Appeal from the 17th Judicial
District Court, Parish of Lafourche
Honorable Walter I. Lanier, Jr., Judge

BLANCHE, Justice.

Defendant, David D. Martin, was indicted by grand jury for four counts of first degree murder in violation of LSA-R.S. 14:30. Trial was held April 3-11, 1978. Defendant was found guilty on each count by a twelve-person jury. Following the sentencing portion of the trial, the jury unanimously recommended that the defendant be sentenced to death on each count. On April 25, 1978, the defendant was sentenced to death on each count of first degree murder.

Defendant assigns nineteen errors as the basis for his appeal before this Court. Assignments 15, 16, 17 and 18 relate to the constitutionality of the death penalty and will be discussed in the sentence review portion of this opinion. Finding no reversible error in either the guilt or sentence portion of the trial, we affirm both the conviction and the sentence.

FACTS

On August 11, 1977, Wayne Melancon, a wireline operator in Houma, Louisiana, picked up the defendant, David D. Martin, and his wife as they walked in the rain. This was the first time Melancon had ever met the defendant. He took the Martins to their home, helped them unload their groceries and visited

for a while. Melancon then asked the defendant and his wife over to his house to get better acquainted. The defendant and Melancon went to Melancon's house where they listened to music and Melancon showed Martin his gun collection. Melancon showed the defendant a Colt Python .357 Magnum pistol with a four-inch blue steel barrel which he kept hidden under the mattress of his bed. The gun was loaded with hollow point bullets which had been modified by Melancon by cutting an "X" across the bullet points in order to give them more knock-down power.

While it is unclear, the evidence also indicates that the evening of August 11 was the first night the defendant's wife went to work at the Black Gold Restaurant and Lounge, which was owned by Bobby Todd. The second night of her employment she had sexual relations with Todd and later informed the defendant of this fact. That same night, Friday, August 12, the defendant broke into Wayne Melancon's home and stole the Colt Python .357 Magnum which Melancon had showed him the day before.

On Saturday, August 13, the defendant visited Raymond Rushing, his next door neighbor, showed him the gun and told Rushing he was going to shoot Bobby Todd. Rushing testified that the defendant said he was jealous because his wife was working at the Black Gold.

On Sunday morning, August 14, the defendant went to see Chester Golden. He told Golden that his wife was working at the Black Gold and would not quit. Martin also stated that he and his wife were going to split up and he was going to leave for Texas. The defendant also said he had a bone to pick with Bobby Todd and if he ran into Todd there would be trouble. Martin informed Golden that he had been up the last two nights waiting outside the Black Gold so that he could get Bobby Todd.

He said he had been unable to do this, however, because there were always people around Todd at the Black Gold and he wanted to get him alone. Martin mentioned that it might be impossible because Terry Hebert was always with Todd.

The defendant showed Golden the Colt Python .357 Magnum revolver and told Golden he had stolen it from a convicted felon. Martin said he did not believe the man would report the gun stolen because of his status as a felon. The defendant asked Golden if he knew of a store that was open where he could purchase some ammunition to use to go target shooting. Eventually, after Martin had been unsuccessful in locating any stores open that could sell him the bullets, Golden arranged for Martin to purchase a box of reloads from a man named Tommy Ledet.

Around 5:00 P. M. on the same day, Martin brought his wife by Todd's trailer which was located directly behind the Black Gold. A woman answered and told Mrs. Martin that Todd was asleep. Martin and his wife then left and had supper, where they split a pitcher of beer. Around 7:00 P. M. the defendant dropped his wife at home, telling her he was going to return to its owner the borrowed automobile that they had been driving.

Instead, he returned to the Black Gold. He parked his car down from the place so that he would look like a hitchhiker He went to the trailer, knocked and asked if he could speak to Bobby. One of the victims allowed the defendant to enter the trailer. Todd walked into the room toward the defendant. As he did, Martin pulled the .357 Magnum from under his shirt. Todd offered the defendant two rolls of money which he produced from his pocket believing the defendant to be a robber. Martin responded that he did not want Todd's money, he just wanted Todd to know his name. He then shot Todd twice in the chest. Martin then proceeded to shoot the other three persons who were also in the trailer: Terry Hebert, Anne Tierney and Sandra Brake.

The evidence regarding the exact sequence of events after Todd was shot is sketchy. The defendant told Pamela Wilson that he shot Terry Hebert next and then the two women. The autopsies revealed that Terry Hebert had been shot five times in the back and side, two shots having pierced his heart; Sandra Brake was shot twice in the heart and had defensive wounds on her wrist and arm; Anne Tierney was shot six times, once in the chest, four times in the abdomen and once in the face. The defendant related to Chester Golden that he had shot one of the girls in the stomach and that she would not die. He said she told him she was hurting and begged him to kill her, to finish her, so he shot her in the head and finished her.

There were a total of at least fifteen shots fired. Since the defendant was carrying a six-round revolver, he was required to stop and reload twice during the shooting. After the shooting, the defendant took the rolls of money to make it look like a robbery. He threw the pistol and the money in a nearby bayou.

GUILT

Assignment of Error No. 1

By this assignment the defendant claims the trial court erred in failing to grant a motion in arrest of judgment on the grounds that the indictment was defective. Counsel for defense argues that the failure of the State to include in the indictment the aggravating circumstances on which it would rely in seeking the death penalty is fatal to the indictment.

At the time the offense was committed, first degree murder was defined simply as the "killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm." LSA-R.S. 14:30 (La. Acts 1976, No. 657) The definition of the crime did not include any of the aggravating circumstances contained in Code of Criminal Proceudre Article

905.4. Consequently, none of the aggravating circumstances set forth in the capital sentencing procedure were essential elements of the crime of first degree murder at the time of the offense in this case. Therefore, even if we were to accept defendant's argument that in cases where the aggravating circumstances form an essential element of the crime[1] the State is required to include them in the indictment, it would not benefit the defendant in this case since at the time of the crime the aggravating circumstances in Article 905.4 were not "essential facts constituting the offense charged." LSA-C.Cr.P. art. 464.[2]

Corollary to the question raised by the defendant above is whether a defendant is entitled to pre-trial notice of the aggravating circumstances the State will rely on in seeking the death penalty at the sentencing portion of trial. Unquestionably, the need for reliability in the determination of whether to impose the death penalty by adversary proceedings demands that an accused be afforded full rights of due process. Accordingly, a defendant is entitled in a capital sentencing proceeding, no less than in the guilt or innocence trial, to be informed of the nature and

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1. See State v. Payton, 361 So.2d 866 (La.1978).

2. Were this a prosecution under State v. Payton, supra, we would, nevertheless, be inclined to reject the defendant's challenge to the indictment. It is well settled in our law that in order to allow an accused the opportunity to prepare for his defense, the indictment must fairly inform him of the nature and cause of the accusation against him. State v. Meunier, 354 So.2d 535 (La.1978); State v. Marmillion, 339 So.2d 788 (La.1976). However, an accused's right to know the nature and cause of the charge against him should not be restricted to mean that he must be so informed by indictment only, because sufficient details may also be supplied by a bill of particulars and other discovery devices. State v. Ford, 349 So.2d 300 (La.1977); State v. Pichler, 355 So.2d 1302 (La.1978); State v. Hamilton, 334 So.2d 383 (La.1976).

the cause of the accusation against him, LSA-Const. Art. 1, § 13. Thus, the defendant is entitled to know the aggravating circumstances which the prosecution will seek to prove sufficiently in advance of court proceedings so that a reasonable opportunity to prepare will be afforded.

Our capital sentencing law does not provide a special provision by which the defendant can discover which aggravating circumstances the State will rely upon in seeking the death penalty. However, we believe the legislature intended that the State be required to disclose the aggravating circumstances on which it will rely when the defendant files a bill of particulars under Code of Criminal Procedure Article 484 requesting the same.

Since the defendant does not allege he was unaware of the aggravating circumstances on which the State would rely and the record is devoid of any evidence that the defendant filed a bill of particulars seeking to discover the same, we find this claim to be without merit.

Assignments of Error Nos. 2, 3, 4, 9 and 10

By these assignments of error defendant contends that the trial court erred in refusing to permit inspection of the grand jury testimony of State witnesses.

Defendant filed motions before, during and after trial to obtain the grand jury testimony of all of the State's witnesses or, alternatively, requesting the trial court to conduct an in-camera inspection of the grand jury testimony to determine if there were any material inconsistencies between the grand jury and the trial testimony of these witnesses. The trial judge denied these motions.

Defendant's request for a private review of the grand jury testimony runs counter to the well settled practice of keeping

testimony before a grand jury secret. See, Note, Use of Grand Jury Testimony to Impeach Credibility at Trial, 18 Loy.L.Rev. 468 (1971-72). LSA-C.Cr.P. art. 434, in pertinent part, provides:

> "A. Members of the grand jury, all other persons present at a grand jury meeting, and all persons having confidential access to information concerning grand jury proceedings, shall keep secret the testimony of witnesses and all other matters occurring at, or directly connected with, a meeting of the grand jury. However, after the indictment, such persons may reveal statutory irregularities in grand jury proceedings to defense counsel, the attorney general, the district attorney, or the court, and may testify concerning them. Such persons may disclose testimony given before the grand jury, at any time when permitted by the court, to show that a witness committed perjury in his testimony before the grand jury. A witness may discuss his testimony given before the grand jury with counsel for a person under investigation or indicted, with the attorney general or the district attorney, or with the court."

Unless the request for grand jury testimony falls under the two exceptions mentioned under LSA-C.Cr.P. art. 434, the testimony cannot be used in Louisiana for cross-examination.[3] State v. Sheppard, 350 So.2d 615 (La.1977); State v. O'Blanc, 346 So.2d 686 (La.1977); State v. Miller, 319 So.2d 339 (La.1975); State v. Devore, 309 So.2d 325 (La.1975); State v. Ivy, 307 So.2d 587 (La.1975). This Court has also interpreted LSA-C.Cr.P. art. 434 to hold that the testimony of a witness before a grand jury is inadmissible to prove a witness' prior inconsistent statement at trial. State v. Terrebonne, 256 La. 385, 236 So.2d 773 (1970).

Concerning defendant's general request for an in-camera inspection of the grand jury testimony, in addition to violating its traditionally maintained secrecy, it is settled that a trial judge is not required to grant an in-camera inspection in response to defendant's general request. State v. Lewis, 353 So.

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3. LSA-C.Cr.P. art. 716 (A) also authorizes the defendant to inspect recorded testimony of the defendant before the grand jury.

2d 703 (La.1977); State v. May, 339 So.2d 764 (La.1976). In the instant case the trial judge found that defendant failed to demonstrate a particular need for the grand jury testimony of any of the State witnesses. Under these circumstances, the trial judge ought not to be burdened with the task of examining voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. See Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed2d 973 (1966).

Assignments of Error Nos. 5, 6, 7, 8

By these assignments of error defendant alleges that the trial court erred in refusing to allow defendant to inspect the written statements of all of the State's witnesses. Defendant made several motions for the production of statements made by each of the State's witnesses to the prosecution prior to trial, or alternatively, that the trial court conduct an in-camera inspection of the written statements of each witness after they testified in order to determine whether they contained any material for impeachment purposes. Defendant did not allege the existence of prior inconsistent statements by any State witness except Mrs. Isabella Powers, nor did defendant contend that any of these witnesses' pre-trial statements contained Brady material.

Statements made by witnesses to the district attorney or agents of the State are not discoverable. LSA-C.Cr.P. art. 723. See State v. Ball, 328 So.2d 81 (La.1976); State v. Rose, 271 So.2d 863 (La.1973). Moreover, defendant did not lay a proper foundation for impeachment of any of the State's witnesses at trial. See State v. Lovett, 359 So.2d 163 (La. 1978); State v. Nails, 255 La. 1070, 234 So.2d 184 (1970).

However, defendant made a specific request for Isabelle Powers' written statements alleging that her statements contained Brady material and would disclose prior inconsistent statements.

Mrs. Powers testified that she made several phone calls to Bobby Todd's trailer on the night of the murders. These phone calls assisted the State in establishing the time of the offense.

Defense counsel insisted that during an informal discovery meeting prior to trial, the State supplied him with information supposedly based on Mrs. Power's pre-trial statements that one of the phone calls was made at 7:50 P. M. The State denied any inconsistent information was given to defendant. The trial court conducted a short hearing and the district attorneys involved in the pre-trial motions testified that the phone calls discussed at this informal discovery meeting were placed at approximately 7:30 P. M. and 8:05 or 8:10 P. M. and at no time was a 7:50 P. M. call mentioned. Following a short recess called in order for the State to examine its files, the State declared that according to the report of the Lafourche Parish Sheriff's Department dated August 16, 1977, the time span was 7:30 on the second phone call and 8:10 or 8:15 P. M. for the other call. The State disclosed this police report:

> "'She stated that she had worked at the Black Gold for some time and that she had at one time lived in the trailer with Bobby Todd. On this night she called the trailer about 7:30 P. M., when she had spoke to Bobby Todd. She said that Bobby had told her he had just awakened and that he had slept some thirteen hours. She also said that Bobby was in good spirits. After talking to Bobby, Isabella said that she had talked to Sandy and that ended the conversation. She had told Sandy that she was going to pick her up around 8:30 p.m. to go to New Orleans for a trip which had been planned earlier. She then called again about 8:10 or 8:15 p.m.' That's the contents of our statements."

In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), the United States Supreme Court held suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to

punishment, regardless of the good faith or bad faith of the prosecution. Although there is no duty to provide defense counsel with unlimited discovery, if the subject matter of such a request is material or if a substantial basis for claiming materiality exists, it is reasonable to require the prosecution to respond by either furnishing the information or submitting the problem to the trial judge. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). In the instant case defendant's request for information of a pretrial written statement that was inconsistent with in-court testimony constituted a specific and relevant request and he demonstrated a particularized need. See State v. Harvey, 358 So.2d 1224 (La.1978); State v. Falkins, 356 So.2d 415 (La.1978); State v. May, 339 So.2d 764 (La.1976). The State responded by disclosing the contents of the police report which substantiated Mrs. Powers' testimony at trial. Accordingly, the trial judge's ruling denying defendant the right to inspect the State's files was proper.

These assignments of error have no merit.

Assignment of Error No. 11

Defendant alleges that the exclusion of sixteen veniremen because of their conscientious objection to the death penalty deprived defendant of his right to trial by a fair and impartial jury. LSA-C.Cr.P. art. 798. Additionally, defendant contends that the mandate of Witherspoon was violated because the court did not require the State to question each prospective juror about each aggravating circumstance to insure that there were no aggravating circumstances under which they could vote for the death penalty. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), held that no death sentence can be imposed if the voir dire testimony indicates that the jury imposing or recommending the sentence was chosen by

excluding veniremen for cause simply because they voiced general objections to capital punishment or expressed conscientious or religious scruples against its infliction. See also Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).

All of the prospective jurors excused for cause clearly stated that they would vote against capital punishment regardless of the nature of the crime proved. Consequently, all jurors excused for cause in the instant case did not merely express general objections to the death penalty. Rather, they clearly indicated that under no circumstances would they impose the death penalty regardless of the evidence presented by the State. This Court has repeatedly permitted exclusion of such jurors under the language of LSA-C.Cr.P. art. 798. State v. Unger, 362 So.2d 1095 (La.1978); State v. Sheppard, supra; State v. Williams, 343 So.2d 1026 (La.1977); State v. Hunter, 340 So.2d 226 (La.1976); State v. Miles, 339 So.2d 735 (La.1975); State v. Jones, 332 So.2d 466 (La.1976); State v. Rester, 309 So.2d 321 (La.1975).

Assignment of Error No. 12

By this assignment of error defendant alleges that the trial court erred in admitting into evidence clothing seized without a warrant from the home of defendant.

At the motion to suppress hearing, officers testified that on August 15, 1977, defendant's wife agreed to come down to the police station and give a statement. After Mrs. Martin signed the statement, she orally consented to allow officers to search her home. They accompanied defendant's wife to her home in order to search for the clothing that defendant was wearing on tne evening of the offense. One officer found a pair of pants and defendant's wife located a shirt and turned it over to the police. Both officers testified that no fear,

intimidation, menaces, threats, inducements or promises were used in order to secure Gloria Martin's consent.

However, Mrs. Martin testified that when she gave her statement several officers told her that if she did not quit lying, they would arrest her. She acknowledged that the officers did not threaten to file charges against her if she did not give her consent and that she gave the officers permission to go to her home to search for the clothing. Nevertheless, she maintained that she operated under fear when she gave her statement and consent.

The State then brought in ten deputies, including those officers who had taken Mrs. Martin's statement and those who conducted the search. Mrs. Martin was unable to remember or identify which officers had frightened her. Moreover, the officers specifically rebutted her testimony. After considering the testimony of the witnesses at the motion to suppress hearing including their appearance and demeanor on the witness stand, the trial judge concluded that defendant's wife freely and voluntarily gave her consent and admitted the items of clothing into evidence.

In the case of a warrantless search the burden of proof rests on the State to show that an exception to the requirement of a search warrant is applicable. State v. Franklin, 353 So.2d 1315 (La.1977); Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Consent is a recognized exception to the warrant requirement. State v. Lukefahr, 363 So.2d 661 (La.1978); State v. Morris, 340 So.2d 195 (La.1976). Consent of a spouse to search jointly owned and controlled premises permits a warrantless search. State v. Johnson, 343 So.2d 155 (La.1977); State v. Dupuy, 319 So.2d 299 (La.1975); cf. United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

The voluntariness of consent is determined only after a review of the totality of facts and circumstances surrounding the giving of consent. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); State v. Temple, 343 So.2d 1024 (La.1977). The trial judge's factual determination as to the voluntary nature of consent to search is entitled to great weight inasmuch as it involves the credibility of witnesses he had the opportunity to hear and observe. State v. Dunbar, 356 So.2d 956 (La.1978); State v. Tennant, 352 So.2d 629 (La.1977); State v. Temple, supra. The trial judge concluded that defendant's wife freely and voluntarily gave her consent to the search. As the officers specifically rebutted Mrs. Martin's testimony and she was unable to identify those officers who allegedly threatened her, the trial judge did not abuse his discretion in finding the consent voluntary.

Assignment of Error No. 13

By this assignment defendant argues that the court erred in denying the defendant's request for a mistrial after a police officer testified that defendant's wife told him that the shirt she gave the officers belonged to defendant, such a statement being hearsay.

After the hearing on defendant's motion to suppress, the clothing was admitted into evidence. Officer Lirette testified before the jury concerning the acquisition of the clothing:

> "The blue jean shirt was received by Detective Boudreaux from the wife of Mr. Martin, and the trousers came from a bathroom at that residence, that Mrs. Martin identified as belonging to her husband."

Defendant objected and requested the judge to instruct the jury to disregard the comment. The trial judge complied with the request. Later in the trial, Officer Boudreaux testified:

"This is a shirt we picked up out of the house which Gloria Martin gave to Detective Lirette and said it belonged to David Martin."

Defendant again requested an admonition and the trial judge complied with that request. He then requested a mistrial claiming that such a hearsay statement so prejudiced the jury that an admonition to the jury was insufficient to cure it. The trial judge denied this request.

Defendant contends that he was irreparably prejudiced by this hearsay statement because later testimony by an expert serologist indicated that the shirt had thereon a trace of blood.

Hearsay evidence is testimony in court, or written evidence, of an out-of-court statement offered to show the truth of the matter asserted therein and resting its value upon the credibility of the out-of-court asserter. State v. Martin, 356 So.2d 1370 (La.1978); McCormick on Evidence, § 246 (2d ed. 1972); Pugh, Louisiana Evidence Law, 387 (1974). The traditional exclusion of hearsay evidence is based upon considerations of unreliability and of potential unfairness to the accused to permit the introduction of out-of-court statements which cannot be tested by cross-examination of the out-of-court declarant. State v. English, ____ So.2d ____ (La.1979), No. 62,823; State v. Ford, 336 So.2d 817 (La.1976). For these reasons, hearsay evidence is inadmissible in Louisiana criminal trials unless otherwise provided by law. LSA-R.S. 15:434.

In the present case, the statement by Officer Boudreaux was inadmissible hearsay. The trial court admonished the jury to disregard the officer's statement regarding the ownership of the shirt. Mistrial is a drastic remedy and, except in instances in which a mistrial is mandatory, see LSA-C.Cr.P. art. 770, is warranted only when trial error results in substantial prejudice to the defendant depriving him of the reasonable expectation of a fair trial. State v. Overton, 337 So.2d 1058 (La.1976); State

v. Redfud, 325 So.2d 595 (La.1976); State v. Whitley, 296 So.2d 820 (La.1974). When a prejudicial remark or comment is made by a witness or person other than the judge, district attorney, or a court official, the court may grant a mistrial only if it is satisifed that an admonition is not sufficient to assure the defendant a fair trial. State v. Redfud, supra; State v. Dupuy, 319 So.2d 299 (La.1975).

Examining the record as a whole, the hearsay statement does not appear so prejudicial that a mistrial should have been declared. The State apparently introduced the shirt at trial because the spot of blood was arguably inculpatory since it may have been from one of the victims. However, the victims' blood types were never introduced at trial and the only evidence of blood at the murder scene indicated type O blood. Moreover, the defendant offered evidence that his own blood type was type A, the same as the blood on the work shirt. There did not appear to be a serious dispute that the shirt did not belong to defendant since defendant's wife located the shirt for the police. Although the police officer should not have testified to hearsay, this error probably did not result in a miscarriage of justice, prejudice to the substantial rights of the accused or constitute a substantial violation of a constitutional or statutory right. LSA-C.Cr.P. art. 921.

Assignment of Error No. 14

Defendant contends that the trial court erred when it submitted the following instruction to the jury:

> "Evidence of a confession or admission of an accused is considered as direct evidence under the law."

Defendant originally objected when the trial court added to the general charge the statement that a confession or admission of an accused is considered as direct evidence under the law.

Defendant objected to this charge arguing that it would amount to a comment by the court on the weight of the evidence and because only testimony of State witnesses established the existence of defendant's admissions.

The record reflects that, following prolonged discussion, the trial judge took special care to alter the suggested charge and that defendant was, in fact, satisfied with the final instruction. Additionally, the jury instruction appears correct. See State v. Snedecor, 294 So.2d 207 (La.1974). Moreover, other instructions by the judge carefully qualified the charge. For example, the trial judge pointed out that it was for the jury alone to determine what has or has not been proven and that the jury had the right to believe or not believe the testimony of any witnesses and the jury was the exclusive judge of the credibility of witnesses. Moreover, after instructing the jury that the corpus delicti must be established, the judge instructed the jury that evidence of a confession, admission or statement of the defendant should be considered in connection with all the other facts of the case and should be given such weight as the jury determined it deserves. Considering the charge as a whole, we cannot say that the trial court erred in its instruction.

Assignment of Error No. 19

By this assignment defendant contends that the court erred when it denied defendant's motion for a new trial based on the discovery of new evidence.

Defendant argues that the discovery by the State of the victims' blood types constituted new evidence of sufficient value that a new trial should have been granted. Defendant's basic argument is that the evidence admitted at trial that type O blood was found on the kitchen counter in the trailer, combined with the discovery after the trial that one of the

victim's blood type was O, supported defendant's theory that the victims were killed elsewhere and their bodies transported to the trailer.

The trial court heard the evidence submitted at the hearing on the motion for a new trial and viewed photographs of the crime scene. Based on this evidence, the trial judge denied the motion. In considering a motion for a new trial based on newly discovered evidence, the test to be employed is not merely whether another jury might bring in a different verdict, but whether the evidence is so material that it ought to produce a different result than the verdict reached. LSA-C.Cr.P. art. 851 (3); State v. Brown, 338 So.2d 686 (La.1976). The trial judge is given considerable discretion and his ruling on this matter will not be disturbed on appeal unless there is a showing of abuse of discretion. State v. Tyler, 342 So.2d 574 (La.1977); State v. Phanor, 325 So.2d 579 (La.1976).

In the instant case discovery of the victims' blood types was not so material that it would have produced a different result than the verdict reached. The presence of blood all over the trailer, including the walls, weakened defendant's theory that the bodies were moved. Additionally, no other drops of blood were found in a direct line between the victim having type O blood and the kitchen counter, nor were any drops of blood found outside or leading into the trailer. The amount of blood in the trailer as well as the fact that no clotting occurred further supported the theory that the murders occurred in the trailer. Accordingly, the trial judge did not abuse his discretion in denying defendant's motion for a new trial.

SENTENCING

(1) Assignments of Error

Assignments Nos. 15, 16, 17 and 18

By these assignments of error defendant alleges that the trial court erred in denying defense counsel's motion in arrest of judgment on the grounds that the death penalty award is unconstitutional.

Defendant first claims that the death penalty amounts to cruel and unusual punishment in violation of the Constitutions of the United States and the State of Louisiana. The United States Supreme Court, in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and its companion cases, specifically held that in light of historical and contemporary experience, the death penalty is not cruel and unusual punishment per se. Likewise, this Court has taken the position that the death penalty does not constitute cruel and unusual punishment under our State Constitution. Cf. State v. Payton, 361 So.2d 866 (La.1978). We find this assignment lacks merit.

Defendant secondly contends that the death penalty is traditionally inflicted in an arbitrary and capricious manner and, therefore, the infliction of death as punishment in this case deprives the defendant of his rights to due process of law guaranteed to him by the Constitutions of the United States and the State of Louisiana. The thrust of defendant's argument is that Louisiana's present capital sentence statute does not satisfactorily eliminate the possibility that the death sentence will be applied in an arbitrary and capricious manner. We disagree.

The United States Supreme Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and its companion cases reversed for resentencing defendants convicted by a jury that had unrestricted discretion to impose capital

punishment. In Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), and Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 2944 (1976), the United States Supreme Court held that Louisiana and North Carolina death penalties failed to provide a constitutionally adequate response to the rejection by Furman of unbridled jury discretion in the imposition of capital sentences. Louisiana and North Carolina legislation specified certain situations in which the death penalty would be mandatory. Moreover, the North Carolina legislation was held invalid even though it provided that the jury could recommend life imprisonment in such cases. The United States Supreme Court said that the statute still vested the jury with standardless discretion, i.e., neither the particularized circumstances of the crime nor the accused's character had to be considered.

The Louisiana legislature, after Roberts, enacted our present capital sentence law modeled upon the Georgia statute which was upheld in Gregg, supra. State v. Sonnier, ___ So.2d ____ (La.1979) (No. 63,293). Our statute, as Georgia's, provides for a bifurcated determination of an accused guilt and punishment. At the sentencing hearing, the Georgia and Louisiana legislation both provide that the jury must consider whether certain specified aggravating circumstances exist and whether any mitigating circumstances are present. Only one aggravating circumstance need be found under the Georgia and Louisiana legislation to support a sentence of death. Other similarities exist between the Georgia and Louisiana legislation: the jury must specify the aggravating circumstances found; the State Supreme Court must consider as part of its mandatory review whether the sentence was influenced by passion, prejudice, or any other arbitrary factor, whether the evidence supports the finding of a statutory aggravating circumstances, and whether the sentence is

excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

With regard to the Georgia procedure, the Court in Gregg v. Georgia, supra, concluded:

> "The basic concern of Furman centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in Furman are not present to any significant degree in the Georgia procedure applied here." (96 S.Ct. at 2940-41)

We believe our statutory scheme provides sufficient protection against the possibility that the death sentence will be applied in an arbitrary and capricious manner. This assignment lacks merit.

Finally, the defendant argues that Louisiana's statutory scheme is unconstitutional because nothing restricts the grand jury's ability to return an indictment for a capital offense, the district attorney's discretion on whether to seek the punishment of death or to charge the defendant on a lesser count, or the jury's ability to find the defendant guilty of a lesser included offense. We find this argument unpersuasive.

In disposing of the same attack on the Georgia statute, the Supreme Court in Gregg v. Georgia, supra, noted:

"... [T]he petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.

"The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." (96 S.Ct. at 2937)

We find this assignment to be without merit.

(2) Capital Sentence Review

The defendant was tried in accordance with the provisions of LSA-C.Cr.P. art. 905-905.9 (1976), which provides for a bifurcated trial in capital cases. At the conclusion of the sentencing hearing, the jury returned the unanimous recommendation that the defendant be sentenced to death on each murder charge. On April 24, 1978, the trial judge followed the binding recommendation of the jury and sentenced David Martin to death on each of the four counts. Our review below is pursuant to Code of Criminal Procedure Article 905.9 and Supreme Court Rule 28 on Capital Review Guidelines. See State v. Sonnier, supra.

Passion, Prejudice or Arbitrary Factors

Counsel for the defense has not argued to this Court that the sentence was the result of passion, prejudice or any other arbitrary factors. From our independent and thorough review of the record, both of the guilt and sentencing portions, together with the capital sentencing report submitted by the trial judge, we conclude that the sentence was not a product of passion, prejudice or any other arbitrary factor.

Aggravating Circumstances

The jury found the following aggravating circumstances to have existed:

(1) The offender knowingly created a risk of death or great bodily harm to more than one person.

(2) The offense was committed in an especially heinous, atrocious or cruel manner.

The evidence establishes that the defendant lay in wait for Bobby Todd on the two nights prior to the murder. He told Chester Golden that he was having difficulty catching Todd alone because people were always with him, particularly Terry Hebert. The defendant told Raymond Rushing on the day before the murders that he (Martin) was going to shoot Todd. The evidence clearly established that when Martin went to Todd's trailer on Sunday evening, he did so with the intent to shoot Todd. While he told Pamela Wilson that at first he thought Todd was alone, he must have known that Todd was not alone when someone else answered the door and allowed him to enter the trailer.[4]

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4. Chester Golden testified that Martin told him that when he (Martin) knocked at the trailer, someone answered the door and he asked if he could talk to Todd. Once inside, Golden related, Martin said Todd came to greet him from another room. We note that Pamela Wilson testified that Martin told her that when he went to the door Todd answered the door and allowed him to enter. Golden's testimony is consistent with other facts established by the evidence: that Todd had a woman living with him in the trailer and that approximately two hours before Martin visited the trailer, his wife had gone to the door and a woman had answered. Wilson's ability to recall her conversation with Martin was called into question by defense counsel who solicited testimony that Wilson had been drinking and smoking marijuana prior to her conversation with Martin. However, even if we were to assume that Martin was unaware that others were in the trailer when he entered, we nevertheless believe that in light of the other facts our analysis would be the same.

Nevertheless, defendant elected to pursue his plan to kill Todd.

We think the evidence is sufficient to support the conclusion that the defendant murdered the victims one after the other as a part of a single consecutive course of conduct in order to prevent any of the victims from reporting to the police the murders of the others. See State v. Sonnier, supra at _____. Martin told Golden, when asked why he killed the women, that "once I started shooting, there was no stopping." Golden gave this account of defendant's response to his (Golden's) inquiry about how Martin thought he could get away with the murders:

> "He said, 'I didn't touch anything.' He said, 'No one saw me.' He said, 'I'll just stick to my story, keep my mouth shut, and I'll get off.' I said, 'David, everybody knows you had a grudge against Bobby Todd.' He said, 'I figure they will pick me up, but I'm just going to keep my mouth shut.' He said, 'They just don't have any proof.'"

In view of the evidence, we believe the act of the defendant is within the interpretation of the statutory aggravating circstance of "knowingly creating a risk of death or great bodily harm to more than one person" set forth by this Court in State v. Sonnier, supra at ____, also handed down this same day.

Having concluded that the jury correctly found one statutory aggravating circumstance to exist, it was within the power of the jury to consider the death penalty. State v. Sonnier, supra at ____. The requirement that at least one statutory aggravating circumstance be found is to insure that the jury's discretion is "controlled by clear and objective standards so as to produce non-discriminatory application." Gregg v. Georgia, supra at 2936. We, therefore, deem it unnecessary to inquire whether the jury could have correctly found that the offense was committed in an especially heinous, atrocious or cruel manner.

Comparison with Other Cases

Section 4(B) of Rule 28 of our Court rules requires the district attorney to include in his sentence review memoranda a synopsis of each first degree murder case in the district in which the sentence was imposed after January 1, 1976. The purpose of this requirement is to aid this Court in determining whether the sentence is disproportionate to the penalty imposed in similar cases in the state, considering both the crime and the defendant.

David Martin is a white male, who was twenty-five years old at the time of the commission of the crime. Defendant left high school after his sophomore year but took the G.E.D. test and completed one year of college. The following testimony was offered in mitigation at the sentencing portion of the trial: Donald Culpepper testified that Martin moved to Houma in 1974 and became involved as a counsellor at the Way-Out Help Clinic, a clinic which sought through counseling to help run-away youths and persons with drug problems. He also became involved in various activities at his church. Martin met and married Gloria Pitre, a young woman who had lived with Culpepper and was a patient at the Help Clinic. In December of 1976, a child was born to the couple. The couple desired to have natural childbirth, which would include David Martin assisting in delivering the baby. The reason is not revealed by the record, but the child was born with brain damage. Culpepper and Martin's brother both testified that Martin felt badly about the child's brain damage and somehow blamed himself. Mary Hill testified that Martin and his wife at one time had been house parents at the Whispering Pines Girls Home. She also testified that her bank had lent money to the couple. Testimony at the trial on the merits revealed that Martin's only prior conviction was for driving without a driver's license.

Based on the above evidence, there is no question that the first mitigating circumstance, that the defendant had no significant history of prior criminal activity, is present. The defense has argued that the offense was committed under circumstances while the offender was under the influence of extreme mental or emotional disturbance. The evidence established that a child was born to the defendant approximately nine months prior to the murders, that the child had brain damage and that the defendant somehow blamed himself. The record also reflects that on the second night the defendant's wife worked at the Black Gold (three nights prior to the murders), she engaged in sexual relations with Bobby Todd and related this fact to the defendant. Further, Martin planned to leave his wife, because she would not quit work at the Black Gold, and to return to Texas. Also, evidence indicated that someone had stolen the defendant's car two months prior to the murders. No direct evidence of any mental or emotional disturbance was submitted, however.

The district attorney's capital sentencing report indicates there have been no other first degree murder convictions in that parish since January 1, 1976. Counsel for defense has submitted a list of defendants who were charged with first degree murder and were either allowed to plea bargain to a lesser included offense or were found guilty of a lesser included offense by a jury. Also included are several other cases in which he alleges the elements of first degree murder were present but the defendant was charged with another offense. He claims these cases show a death sentence in this case would be disproportionate since others who could have possibly received it did not because of decisions made during the charging phase or decisions made by juries to return a verdict of a lesser included offense. We find this argument unpersuasive for the same reasons set forth above in answer to Assignments of Error Nos. 15, 16, 17 and 18. (See claim No. 3 therein.)

The defendant was convicted of killing four people in a brutal, savage manner. The evidence showed he lay in wait to kill Todd for two successive evenings before finally getting to him on the third night. Martin killed three people to prevent them from being able to disclose that he was Todd's killer. It is clear from a reading of our Capital Sentencing Law that killing a victim in order to prevent that person from being able to report a separate crime (a kidnapping, an armed robbery, a separate murder, et cetera) is strictly condemned.

We find, therefore, considering both the defendant and the nature of the offense that the sentence is not disproportionate to the penalty which has been imposed in similar cases.

Conclusion

Since we find the assignments of error with regard to the sentencing portion are without merit and further find that the sentence was not imposed as a result of passion, prejudice or other arbitrary factors; the evidence supports the jury's finding of a statutory aggravating circumstances, and the sentence is not disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The sentence is affirmed.

DECREE

For the above and foregoing reasons, the conviction and sentence of the defendant are affirmed.

AFFIRMED.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS NO. 62,687

DAVID D. MARTIN

CALOGERO, Justice, concurring in part, dissenting in part

I concur in the affirmance of defendant's conviction but dissent on the imposition of the death penalty.

This Court is constitutionally required to review a death sentence to determine if it is excessive. Louisiana Constitution 1974, Article I, Section 20, La. C.Cr.P. art. 905.9, Rule XXVIII, Rules of Supreme Court. Among the factors we are by statute compelled to consider in this regard are any and all mitigating circumstances.

Defendant has no significant history of prior criminal activity. His crimes were committed under the influence of extreme mental and emotional disturbances, and under circumstances which he more than likely believed provided a moral justification or extenuation for his conduct. These factors prompt me to conclude that the death penalty is excessive punishment in this case.

SUPREME COURT OF LOUISIANA

NO. 62,687

STATE OF LOUISIANA

VERSUS

DAVID D. MARTIN

DENNIS, Justice, concurring in part and dissenting in part.

I respectfully dissent from the imposition of the death penalty on this defendant but concur in the affirmance of his conviction. The death sentence is excessive in this case.

I. The Evidence.

The state presented evidence tending to establish the following:

A. The Crime.

Two nights after David D. Martin's wife went to work for Bobby Todd at the Black Gold restaurant and bar in Houma she had sexual relations with Todd. She told Martin about the affair and refused to quit her job as he asked. Several days later Martin stole a .357 Magnum pistol from an acquaintance. He told a friend he had the pistol and about his animosity for Todd. Martin waited outside Todd's place of business on two occasions in attempts to find him alone, but both times Todd was in the company of another person.

Shortly before 8:00 p.m. on the night of August 14, 1977, two days after the pistol was stolen, David Martin went to Bobby Todd's house trailer behind the Black Gold. Present at the time were Todd, his assistant, Terry Hebert, and two women, Anne Tierney and Sandra Brake. Martin knocked on the door and was allowed to enter. He pulled out his revolver when Todd approached, and Todd offered him two rolls of money from his pocket. Martin said, "No, I don't want your money, I just want you to know my name," and shot Todd twice. He then killed the other three occupants of the trailer. Two or more bullets were shot into each body, requiring Martin to stop and reload. Terry Hebert was shot in the back as he tried to escape. One of the women was shot in the head when she begged Martin to kill her after he initially wounded her in the stomach.

After leaving Todd's trailer shortly after the killing Martin threw the .357 Magnum in a bayou and went to a friend's house. Guilt-ridden, Martin insisted that his friend drive around with him while he confessed to the crimes. He stated that he had to "tell somebody." However, he was unable to explain why he killed the others after Todd except that he said he could not stop shooting. Although he asked his friend to pledge his secrecy, Martin later the same evening told four other friends and neighbors of the slayings. He asked one of these persons to dispose of two spent cartridges which were later linked to the .357 Magnum that had been stolen from a house in Houma one night after Martin had visited there and seen the revolver.

B. The Defendant.

David D. Martin is a white male who was twenty-five years old on the date of the offense. He was born in

Texas and lived in Denver and New Orleans before moving to Houma in 1974. He attended high school through the sophomore grade, passed the G.E.D. test, and completed one year of college. The record contains no I.Q. or psychiatric data. Martin has worked as a carpenter, packing inspector, drug abuse counselor, lay church worker, house parent at a drug abuse clinic, door to door salesman and tacker in a shipyard.

Martin's first marriage ended in divorce. He has an eight year old child by his first wife, but the record does not disclose with whom the child lives. At the suggestion of his sister and friends, Martin came to Houma in 1974 to work in a local drug rehabilitation clinic. There he met and married his second wife who was an out patient at the clinic. About nine months before the offense a baby girl was born to the couple. Martin attempted to deliver the child himself and caused it to suffer brain damage. Martin blamed himself and became despondent. Shortly after this he left his church and his job at the drug abuse clinic and began taking drugs himself. His poor financial condition worsened when his car and two of his paychecks were stolen. It was at this point that his wife informed him of her infidelity and refused to break off her relationship with Bobby Todd.

On the afternoon before the murders Martin borrowed a car and dropped his wife off for work at Todd's trailer. She was informed by a woman in the trailer that Todd was asleep, so Martin took her to get something to eat. During the afternoon Martin drank a pitcher of beer and smoked an unknown quantity of marijuana.

II. Capital Sentence Review

This Court reviews every death sentence to determine if it is excessive. La. Const. 1974, Art. I, § 20; La. C.Cr.P.

art. 905.9. In deciding whether the sentence is excessive, this Court determines (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Rule XXVIII, Rules of Supreme Court.

A. Aggravating Circumstances

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the death penalty be imposed. La. C.Cr.P. art. 905.3. The death sentence in the present case is based upon the jury's finding that the State proved beyond a reasonable doubt two aggravating circumstances: (1) The offender knowingly created a risk of death or great bodily harm to more than one person; (2) The offense was committed in an especially heinous, atrocious or cruel manner.

The aggravating circumstance provided by La. C.Cr. P. art. 905.4(d)--"[t]he offender knowingly created a risk of death or great bodily harm to more than one person"-- is similar to those which have been upheld against charges of impermissible vagueness by the Supreme Court. Gregg v. Georgia, 428 U.S. 153, 202, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859, 891 (1976); Proffitt v. Florida, 428 U.S. 242, 256, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913, 924 (1976). However, in these cases the high court noted that such a phrase "might be susceptible to an overly broad interpretation," Gregg, 428 U.S. at 202, 96 S.Ct. at 2939, 49 L.Ed.2d at 891,

and expressly limited its approval to the statutory language as narrowly construed by the state courts.

This Court in State v. English, ____So.2d____ (La. 1979), No. 62,823, recently construed the plural risk language of our statute in a narrow fashion indicating that an aggravating circumstance should be found "when the single consecutive course of conduct contemplates and causes the knowing creation of great risk of death or great bodily harm to more than one person" and not when "it appears that the defendant intended to commit each murder by a distinct act, that is, by shooting each intended victim individually at short range." Id. ____So.2d____.

In the instant case whether Martin's acts of murder should be considered "distinct" or a "single consecutive course of conduct" by which the offender intended to cause great risk of death or harm to more than one person presented a difficult question for the jury. Its decision presents us with an even more abstruse issue: whether the evidence reasonably supports a finding beyond a reasonable doubt that when Martin shot Todd he had formed an intention to seriously harm or do away with all of the occupants of the trailer.* There is no evidence that Martin had a motive or design to kill anyone other than Todd. There is very little evidence to indicate that Martin knew other people were in the house trailer when he knocked on the door. His unguarded, apparently spontaneous and

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* See, Proffitt v. Florida, in which the Supreme Court qualifiedly approved a construction that a defendant created a great risk of death because he "'obviously murdered two of the victims in order to avoid a surviving witness to the [first] murder.'" 428 U.S. at 256, 96 S.Ct. at 2968, 49 L.Ed.2d at 2960, quoting from Alvord v. State, 322 So.2d 533, 540 (La. 1975).

remorseful narration of the killings to his friend tends to show that he did not plan to kill anyone other than Todd and that he did not kill the others to eliminate surviving witnesses. Altogether, the evidence does not support a finding beyond a reasonable doubt that Martin actually and specifically intended to create a risk of wholesale death such as an offender who, for instance, shoots into a church congregation or explodes a bomb in an inhabited building.

Other states' interpretations of provisions similar to the aggravating circumstance provided by La. C.Cr.P. art. 905.4 (g)--"[t]he offense was committed in an especially heinous, atrocious or cruel manner"--have been approved by the Supreme Court. Recognizing the arguable proposition that "any murder involves depravity of mind or an aggravated battery" the high court found "no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." Gregg v. Georgia, 428 U.S. at 201, 96 S.Ct. at 2938, 49 L.Ed.2d at 890. In reviewing the Florida Supreme Court's interpretation of its statutory provision as directed only at "'the conscienceless or pitiless crime which, is unnecessarily torturous to the victim,'" the high court could not say that the provision, as so construed, provides inadequate guidance. Proffitt v. Florida, 428 U.S. at 255, 96 S.Ct. at 2968, 49 L.Ed.2d at 924.

In State v. English, supra, this Court tacitly adopted the Georgia and Florida interpretations approved in Gregg and Proffit, recognizing that "any system that seeks to distinguish rationally among murders in terms of heinousness must necessarily incorporate into that concept some idea of torture or the pitiless infliction of unnecessary pain on the victim." Id. ____So.2d_____. Applying these concepts to the evidence of the instant case we conclude that there was no rational basis for a finding of proof beyond a reasonable

doubt that Martin intended to commit a conscienceless or pitiless crime which was unnecessarily torturous to the victims. Accordingly, the jury's finding that the offenses were committed in an especially heinous, atrocious or cruel manner was not sufficiently supported by the evidence.

B. Mitigating Circumstances

There are an unusually large number of mitigating circumstances in this case. A majority of the statutory factors is present.

The defendant David Martin has no significant prior history of criminal activity. La. C.Cr.P. art. 905.5(a). Besides a $10 fine in 1969 for failure to have a driver's license, Martin has no prior criminal record.

The offense was committed while the offender was under the influence of extreme mental or emotional disturbance. La. C.Cr.P. art. 905.5(b). The emotional disturbance brought on by Martin's guilt over the permanent brain damage he inflicted upon his child, his loss of religious faith, his financial reversals, and his wife's open and unrepetent infidelity was in great likelihood extreme.

The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct. La. C.Cr.P. art. 905.5(d). Arguably, of course, there can never be a reasonable belief in a moral justification or extenuation for murder. However, we believe that the statute was intended to be construed so as to allow some slight extenuation for a husband, such as Martin, who is goaded to distraction by his adulterous wife--not an excuse for the crime, of course, but a factor which tends to argue against depicting Martin as a hardened, cold-blooded killer.

At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. La. C.Cr.P. art. 905.5(e). There was evidence that defendant had consumed a pitcher of beer and smoked some marijuana prior to the commission of the offenses.

The legislature's solemn declaration that the penalty of death shall be just retribution for homicidal offenders whose crimes involve especially heinous, atrocious or cruel methods or the risk of wholesale murder is tempered by procedural and substantive safeguards. The state must prove beyond a reasonable doubt that the offender's act is of the type punishable by the ultimate penalty. Even then, the jury may not legally recommend a sentence of death if the evidence of aggravation is offset by mitigating circumstances to the extent that capital punishment is inappropriate.

In the instant case, David D. Martin stands adjudged of having murdered four people. His crimes are unpardonable and he certainly deserves the severest kind of non-capital punishment. However, the evidence does not prove with the high degree of certainty required by law that Martin's acts were marked by the type of bestiality or misanthrophy which I believe the legislature intended to recompense with death. The jury's finding that the offenses were committed in an especially heinous, atrocious or cruel manner was clearly erroneous. Nor was the proof sufficient that Martin set upon his course of conduct with knowledge that he was creating a risk of death to more than one person. Furthermore, the mitigating evidence clearly offsets the evidence of aggravation so as to make the death penalty inappropriate in this case.

I respectfully dissent also because the majority persists in its refusal to articulate standards of review for errors of fact and law in capital sentence proceedings, and it is evident that the standards applied by the majority in the instant case fall short of the minimum criteria necessary to assure due process of law in the imposition of the death penalty. See my dissenting opinion in State v. Sonnier, ____So.2d____ (La. 1979), No. 63,293.

* * *

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APPENDIX B

Supreme Court of the United States

No. A-594

DAVID DENE MARTIN,

Petitioner,

v.

LOUISIANA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 30, 19 80.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 8th day of January, 19 80

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States
BY [signature]
Deputy

APPENDIX C

Supreme Court of Louisiana

NEW ORLEANS, 70112

STATE OF LOUISIANA

VS NO. 62,687

DAVID D. MARTIN

In Re: David D. Martin, applying for Stay of Execution, (Lafourche Parish).

January 28, 1980

Considering defendant's application that his execution, presently scheduled for February 8, 1980, be stayed,

IT IS ORDERED that execution of David D. Martin be and the same is hereby stayed until such time as the United States Supreme Court takes final action on his writ of certiorari or until such other time, in advance of that date, as this Court deems proper.

FWS

JAD

PFC

WFM

JLD

JCW

BLANCHE, J., absent.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
January 28, 1980

Clerk of Court

APPENDIX D

Article 905: Capital Cases; Sentencing Hearing Required.

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Article 905.1: Sentencing Hearing Jury; Commencement.

A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

B. If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellant(sic) court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in Title XXVI, Chapter 3 of The Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empanelled.

Article 905.2: Sentencing Hearing; Procedure And Evidence.

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Article 905.3: Sentence Of Death; Jury Findings.

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

Article 905.4: Aggravating Circumstances.

The following shall be considered aggravating circumstances:

(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;

(b) The victim was a fireman or peace officer engaged in his lawful duties;

(c) The offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping;

(d) The offender knowingly created a risk of death or great bodily harm to more than one person;

(e) The offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) The offense was committed in an especially heinous, atrocious or cruel manner.

Article 905.5: Mitigating Circumstances.

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Article 905.6: Jury; Unanimous Recommendation.

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Article 905.7: Form Of Recommendations.

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the

defendant be sentenced to death.

Aggravating circumstance or circumstances found:

s/ _____
FOREMAN"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/ _____
FOREMAN"

Article 905.8: Imposition Of Sentence.

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Article 905.9: Review On Appeal.

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

RULE XXVIII. CAPITAL SENTENCE REVIEW

RULE 905.9.1 (applicable to La.C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

APPENDIX E

Article 905.4: Aggravating Circumstances.

The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(b) the victim was a fireman or peace officer engaged in his lawful duties;

(c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney, general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Section 3. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Louisiana Constitution of 1974.

Section 4. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 5. All laws or parts of laws in conflict herewith are hereby repealed.

Approved June 29, 1979.

APPENDIX F

as Sandra Brake. He was not kind-hearted to Terry Hebert. Nor was he sensitive to Bobby Todd. He talked about the finality of the death penalty. We would ask you to consider the finality of what was done to the four victims in this crime. He says that David Martin committed this crime because he was in pain, in mental pain. We would ask you to consider the physical pain of the victims. And again I have to go back to the part about the atrocity of this crime. Again I must bring up, I'm afraid, the way Anna Tierney died, with a gun to her face, the trigger being squeezed, and the top of her head blowing off. I tell you this again. I bring these facts out and make these arguments, and I make them as strongly as I can to you, but I do not wish this jury to walk into that room and do anything emotional. I think for the death penalty to be effective it has to be done coldly and dispassionately. But these are the aggravating circumstances we have, and I want you to consider them, and I want you to consider these circumstances for what they are and this crime for what it is. It is one deserving the death penalty. Nothing more and nothing less, if there is anything more. Ladies and gentlemen of the jury, I would like to thank you for being patient with us for a very, very long time and for sitting through a long and awesome ordeal, and I hope that you never have to sit through anything like this again. Thank you very much.

BY THE COURT:

Ladies and gentlemen, having found the defendant guilty of four counts of first degree murder, you must now determine whether the defendant should be sentenced to death or to life imprisonment without benefit of probation, parole, or

suspension of sentence on each count. It is your duty to consider the circumstances of the offense and the character and propensities of the defendant to determine the sentence to be imposed. In reaching your decision regarding the sentence to be imposed you must be guided by these instructions. (A) You are required to consider the existence of aggravating and mitigating circumstances in deciding which sentence should be imposed. The statutory aggravating circumstances are: [a] the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary,or armed robbery; [b] the victim was a fireman or peace officer engaged in his lawful duties; [c] the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping; [d] the offender knowingly created a risk of death or great bodily harm to more than one person; [e] the offender offered or has been offered or has given or received anything of value for the commission of the offense; [f] the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony; [g] the offense was committed in an especially heinous, atrocious, or cruel manner. The clerk will furnish you a list of the statutory aggravating and mitigating circumstances which you may bring with you during deliberation. The clerk is directed to give these lists of the aggravating and mitigating circumstances as set forth in Articles 905.4 and 905.5 of the Louisiana Code of Criminal Procedure to the foreman of the jury. Copies of these lists were submitted to counsel for the parties prior to this hearing. (B) Before you decide that a sentence of death should be imposed, you must unanimously find beyond a reasonable doubt

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17TH JUDICIAL DISTRICT COURT
THIBODAUX, LOUISIANA 70301

that at least one statutory aggravating circumstance exists. (C) If you unanimously find beyond a reasonable doubt that any of the statutory aggravating circumstances existed, you are authorized to consider imposing a sentence of death. If you do not unanimously find beyond a reasonable doubt that any of the statutory aggravating circumstances existed, then life imprisonment without benefit of probation, parole, or suspension of sentence is the only sentence that may be imposed. (D) Even if you find the existence of an aggravating circumstance, you must also consider any mitigating circumstances before you decide a sentence of death should be imposed. The law specifically lists certain mitigating circumstances. The statutory mitigating circumstances are: [a] the offender has no significant prior history of criminal activity; [b] the offense was committed while the offender was under the influence of extreme mental or emotional disturbance; [c] the offense was committed while the offender was under the influence or under the domination of another person; [d] the offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct; [e] at the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication; [f] the youth of the offender at the time of the offense; [g] the offender was a principal whose participation was relatively minor; [h] any other relevant mitigating circumstance. You will note that you are authorized to consider any other relevant mitigating circumstance. Even if you should find beyond a reasonable doubt that one or more aggravating circumstance

exists and even if you should determine that no mitigating circumstances exist, although under the law you would be authorized to impose a sentence of death,you are not required to do so. (E) The fact that you are given a list of aggravating and mitigating circumstances should not cause you to infer that the Court believes that any of the circumstances do or do not exist. The law requires that the jury be given such a list in every case. Whether any of the aggravating or mitigating circumstances exist is a fact for you to determine based upon the evidence presented. (F) In addition to the evidence presented at this sentencing hearing, in deciding the sentence to be imposed you may consider evidence presented during the guilt-determination trial. (G) I now ask the clerk to hand to the foreman two blank forms of verdicts for each charge. The first form of verdict reads: "Having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death." In the event you unanimously decide the death penalty should be imposed, a space is provided to write out the statutory aggravating circumstance or circumstances you unanimously find to exist. The foreman must sign the form. The second form of verdict reads: "The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence." If the jury decides that a life sentence without benefit of probation, parole, or suspension of sentence should be imposed, the foreman need only sign that form of verdict. No listing of aggravating or mitigating circumstances is required. If the jury is unable to unanimously agree on a

recommendation, the Court shall impose a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence. Nothing said or furnished you in these instructions should be taken as an opinion of the Court as to the existence or not of statutory aggravating or mitigating circumstances. It is your responsibility in accordance with the principles of law I have instructed to determine whether the defendant should be sentenced to death or to life imprisonment without the benefit of probation, parole, or suspension.

THE COURT:

Let the record reflect that copies of these charges were furnished to counsel prior to this hearing. I will now sign this instruction and order it filed of record in these proceedings. The bailiff will now retire the jury to begin its deliberations. These proceedings will stand in recess until the jury concludes their deliberations or requests additional charges.

(THE JURY WAS RETIRED TO THE JURY ROOM TO DELIBERATE AT THIS TIME.)

(RECESS)

THE COURT:

Let the record reflect that all parties are present after the recess as were present before the recess, in particular: Mr. John J. Erny, Jr., assistant district attorney, representing the State of Louisiana; Mr. Francis Dugas, district attorney, representing the State of Louisiana; Mr. Ray Bass, representing